Supreme Court, U.S.
FILED
AUG 23 2010
OFFICE OF THE CLERK

169

(2)

No. 09-1414

In the Supreme Court of the United States

RAYMOND L. NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Article 120(r) of the Uniform Code of Military Justice, 10 U.S.C. 920(r) (Supp. II 2008), which specifies that "consent" is an affirmative defense to the offense of aggravated sexual contact by force, violates due process by shifting the burden of proof of an element of the offense to the defendant.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Dixon v. *United States*, 548 U.S. 1 (2006) 11
Humanik v. *Beyer*, 871 F.2d 432 (3d Cir.), cert. denied, 493 U.S. 812 (1989) 15, 16
Martin v. *Ohio*, 480 U.S. 228 (1987) 11, 12, 13, 14, 16
Middendorf v. *Henry*, 425 U.S. 25 (1976) 10
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 10
Parker v. *Levy*, 417 U.S. 733 (1974) 10
Patterson v. *New York*, 432 U.S. 197 (1977) 10, 11, 16
Russell v. *United States*, 698 A.2d 1007 (D.C. 1997) 15, 17
State v. *Camara*, 781 P.2d 483 (Wash. 1989) 14, 17
Weiss v. *United States*, 510 U.S. 163 (1994) 10
Williams v. *United States*, 327 U.S. 711 (1946) 3
Winship, In re, 397 U.S. 358 (1970) 9, 13, 16

Constitution and statutes:

U.S. Const.:
Art. I 10
Art. I, § 8, Cl. 14 10

Constitution and statutes – Continued:

Amend. V (Due Process Clause) 8, 9, 10
National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3263:
§ 552(c), 119 Stat. 3263 4
§ 552(f), 119 Stat. 3263 4
Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87, 100 Stat. 3620 3
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* 2
Art. 2(a)(1), 10 U.S.C. 802(a)(1) 2
Art. 67(a)(2), 10 U.S.C. 867(a)(2) 6
Art. 77-134, 10 U.S.C. 877-934 2
Art. 120, 10 U.S.C. 920 2
Art. 120, 10 U.S.C. 920 (Supp. II 2008) ..... *passim*
Art. 120(a), 10 U.S.C. 920(a) (Supp. II 2008) 2, 4
Art. 120(a)(1), 10 U.S.C. 920(a)(1) (Supp. II 2008) 4, 5, 11, 13
Art. 120(e), 10 U.S.C. 920(e) (Supp. II 2008) ..... *passim*
Art. 120(r), 10 U.S.C. 920(r) (Supp. II 2008) 4, 8, 11, 13
Art. 120(t)(1), 10 U.S.C. 920(t)(1) (Supp. II 2008) ... 4
Art. 120(t)(2), 10 U.S.C. 920(t)(2) (Supp. II 2008) 5, 12
Art. 120(t)(5), 10 U.S.C. 920(t)(5) (Supp. II 2008) ... 5
Art. 120(t)(5)(C), 10 U.S.C. 920(t)(5)(C) (Supp. II 2008) 12

Statutes—Continued: Page

Art. 120(t)(14), 10 U.S.C. 920(t)(14) (Supp. II 2008) 4, 5, 13
Art. 120(t)(15), 10 U.S.C. 920(t)(15) (Supp. II 2008) 4
Art. 120(t)(16), 10 U.S.C. 920(t)(16) (Supp. II 2008) 4, 12, 13
Art. 134, 10 U.S.C. 934 2
18 U.S.C. 2241-2245 3
18 U.S.C. 2244(b) 3
D.C. Code § 22-3002 (2010) 15

Miscellaneous:

H.R. Rep. No. 594, 99th Cong., 2d Sess. (1986) 3
H.R. Rep. No. 89, 109th Cong., 1st Sess. (2005) 3
2 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 13
Manual for Courts-Martial, United States, Pt. IV (2005 ed.) 2

In the Supreme Court of the United States

No. 09-1414

RAYMOND L. NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-43a) is reported at 68 M.J. 289. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 44a-61a) is reported at 67 M.J. 675.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on January 22, 2010.[1] A petition for reconsideration was denied on February 22, 2010 (Pet. App. 62a). The petition for a writ of certiorari was filed on May 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2).

[1] The petition appendix (Pet. App. 1a) does not accurately reproduce the date of the court's decision.

STATEMENT

Petitioner, a member of the United States Navy, was tried before a general court-martial on the charge of aggravated sexual contact, in violation of Article 120(e) of the Uniform Code of Military Justice, 10 U.S.C. 920(e) (Supp. II 2008). A military judge dismissed the charge mid-trial. On interlocutory appeal, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) reversed and remanded. Pet. App. 44a-61a. The Court of Appeals for the Armed Forces (CAAF) affirmed and remanded the case for further proceedings. *Id.* at 1a-43a.

1. Congress enacted the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, with provisions that define military offenses for members of the United States Armed Forces. See 10 U.S.C. 802(a)(1), 877-934. As relevant here, Article 120 of the UCMJ, 10 U.S.C. 920, defines several offenses involving sexual misconduct, including "rape" and "aggravated sexual contact." 10 U.S.C. 920(a) and (e) (Supp. II 2008).[2]

a. Before 2006, Article 120 defined rape to be "an act of sexual intercourse, by force and without consent." 10 U.S.C. 920 (2006). Other types of sexual assault were separately charged under Article 134 as conduct prejudicial to "good order and discipline" or conduct "bring[ing] discredit upon the armed forces." 10 U.S.C. 934; see *Manual for Courts-Martial, United States* Pt. IV ¶¶ 60.c(1), 63.b(3) (2005 ed.). Like rape, those offenses punished acts of "unlawful force or violence" taken "without the lawful consent of the person affected." *Id.* ¶ 54.c(1)(a) (defining "assault"); see *id.* ¶ 63.b(1), .c (indecent assault). The separate elements

---

[2] Unless otherwise specified, all citations to 10 U.S.C. 920 in this brief are to the 2008 supplement to the U.S. Code.

of "force" and the absence of "consent" reflected a traditional definition of criminal sex offenses. See, *e.g.*, *Williams* v. *United States*, 327 U.S. 711, 715 (1946) (dicta discussing federal crimes of rape and assault with intent to rape); H.R. Rep. No. 594, 99th Cong., 2d Sess. 7-8, 11 (1986) (*1986 House Report*).

b. In 2006, Congress substantially revised Article 120 to "align[] the statutory language of sexual assault law under the UCMJ with federal law under sections 2241 through 2247 of title 18, United States Code." H.R. Rep. No. 89, 109th Cong., 1st Sess. 332 (2005). The 2006 amendments to Article 120 thus built upon the Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87, 100 Stat. 3620 (enacting 18 U.S.C. 2241-2245), which had "modernize[d] and reform[ed] Federal rape provisions" by, *inter alia*, abandoning the portion of the common-law definition of rape that required proof of the absence of "consent." *1986 House Report* 7, 10-11. The 1986 Act defined aggravated sexual abuse and similar federal crimes such that the "[l]ack of consent by the victim is not an element of the offense" in order to focus trials "upon the conduct of the defendant, instead of upon the conduct or state of mind of the victim." *Id.* at 10, 14-16, 18 ("the prosecution need not introduce evidence of lack of consent"); see *id.* at 13 (explaining that it would be "inappropriate" to require "the prosecution to show that the victim did not consent").[3]

Congress's 2006 revision of Article 120 followed that modern approach to sex offenses. Article 120 defines

---

[3] Where Congress found "it appropriate to the offense to require the prosecution to show that the conduct was engaged in without the victim's permission," the Sexual Abuse Act of 1986 "explicitly" set forth "such a requirement" in the statutory text. *1986 House Report* 13 & n.53 (discussing requirement in 18 U.S.C. 2244(b)).

"consent" to mean "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person," 10 U.S.C. 920(t)(14), and establishes that "[c]onsent and mistake of fact as to consent are not an issue, or an affirmative defense, in any prosecution" under Article 120 except as otherwise provided by the statute. 10 U.S.C. 920(r). For the offenses of rape under Article 120(a) and aggravated sexual contact under Article 120(e), Congress specified that "[c]onsent and mistake of fact as to consent * * * are an affirmative defense," *ibid.*, that permit the accused to "den[y] * * * criminal responsibility" without "denying that the accused committed the objective acts constituting the offense charged." 10 U.S.C. 920(t)(16) (defining "affirmative defense"); cf. 10 U.S.C. 920(t)(15) (defining "mistake of fact as to consent").[4]

Article 120(a) provides that a person subject to the UCMJ is guilty of "rape" if he or she causes another person to engage in a "sexual act"—*i.e.*, contact between the penis and vulva or a specified act involving penetration of the genital opening—in one of five prohibited ways. 10 U.S.C. 920(a); see 10 U.S.C. 920(t)(1) (defining "sexual act"). As relevant here, Article 120(a) prohibits causing another to engage in a sexual act by "using force against that other person." 10 U.S.C. 920(a)(1).

Article 120(e), in turn, provides that a person is guilty of "aggravated sexual contact" if he or she engages in or causes "sexual contact" with or by another person with the "intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of

[4] Congress made its 2006 amendment to Article 120 applicable with respect to offenses committed on or after October 1, 2007. See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(e) and (f), 119 Stat. 3263.

any person," "if to do so would violate [Article 120(a)] (rape) had the sexual conduct been a sexual act." 10 U.S.C. 920(e) and (t)(2).[5] Article 120(e) thus requires proof that the accused engaged in or caused sexual contact in one of the five ways proscribed in Article 120(a), including by the use of "force" against the other person (10 U.S.C. 920(a)(1)).

Under Article 120, "[t]he term 'force' means action to compel submission of another or to overcome or prevent another's resistance by" (A) the use or display of a dangerous weapon or object; (B) the suggestion of possession of such a weapon or object; or (C) "physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct." 10 U.S.C. 920(t)(5). If force or the threat of force is established, Article 120 specifies that the affirmative defense of "consent" cannot be established simply by the "[l]ack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear." 10 U.S.C. 920(t)(14) (defining "consent").

2. a. Petitioner was charged in this case with aggravated sexual contact under Article 120(e). The charging document alleges that, on or about December 8, 2007, petitioner engaged in "sexual contact" by "using his hands to fondle the breasts and vaginal area of Airman [redacted], and by thrusting his penis against the buttocks of the said Airman [redacted], by using physical

---

[5] "Sexual contact" means "the intentional touching * * * of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person" or "intentionally causing another person to touch" those areas "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." 10 U.S.C. 920(t)(2).

strength sufficient that she could not escape the sexual conduct." C.A. J.A. 34; see Pet. App. 6a. Petitioner moved to dismiss the charge and, after the parties completed their presentation of the evidence on the merits, the military judge granted the motion. *Ibid.* The judge held Article 120(c) unconstitutional on the ground that it impermissibly "required the defense to carry the burden of proof with respect to an element of the offense" by making "consent" an affirmative defense. *Id.* at 8a; see C.A. J.A. 12-29 (ruling).

b. The government appealed to the NMCCA, which took the case en banc and unanimously reversed and remanded for further proceedings. Pet. App. 44a-61a. As relevant here, the court concluded that "proof of the element of force" in an aggravated-sexual-contact prosecution under Article 120(c) "does not require proof of 'lack of consent'" and that "the affirmative defense of consent does not unconstitutionally shift the burden of proof to the defense." *Id.* at 45a; see *id.* at 52a-60a. The court explained that "[t]he burden of proving force beyond a reasonable doubt is, and always remains, with the Government." *Id.* at 60a. And although Congress made "consent" an affirmative defense in Article 120, the existence of that defense does not preclude the finder of fact from "consider[ing] evidence relevant to the affirmative defense of consent" in the course of "determining whether there is reasonable doubt about the sufficiency of the Government's proof on the element of force." *Ibid.*

c. The Judge Advocate General certified the case for review by the CAAF, see 10 U.S.C. 867(a)(2), which affirmed. Pet. App. 1a-43a. As relevant here, the court rejected petitioner's claim that Article 120(c) offends

due process by forcing the accused to disprove an element of the offense. *Id.* at 17a-38a.

The CAAF concluded that Article 120(c) does not include "the absence of consent" as an element of the offense of aggravated sexual contact. Pet. App. 28a. The prosecution, it explained, must prove that offense by establising beyond a reasonable doubt that "the accused engaged in sexual contact by applying the degree of force described" by statute, but that "the absence of consent is not a fact necessary to prove the crime." *Ibid.* The court rejected petitioner's contention that "consent" nevertheless remained "an 'implicit element' in the offense" under Article 120's "definition of force." *Id.* at 32a-33a. The court explained that Congress specifically "deleted the phrase 'without consent'" from the pre-2006 version of the statute, *id.* at 18a-21a, and that Article 120 now "focuses on the force applied by an accused, not on the mental state of the alleged victim." *Id.* at 33a. "Although the statute describes the degree of force in terms of the relative actions of the accused and the alleged victim, the prosecution is not required to prove whether the alleged victim was, in fact, willing or 'not willing.'" *Ibid.* The court explained that Congress simply "defin[ed] force from the perspective of the action taken by the alleged perpetrator" and it required that such force "constitute[] 'action to compel' another person" regardless whether a particular victim consented or not. *Ibid.*[6]

---

[6] The CAAF explained that Article 120(c)'s definition of aggravated sexual assault departed from traditional use of the lack of "consent" as an element of a sex offense, but it concluded that Congress's broad constitutional authority to define military crimes fully authorized it to redefine military offenses in that manner. Pet. App. 27a-28a. The court added that sexual misconduct in the military involves special harms that

With respect to petitioner's due process claim, the court observed that the Fifth Amendment requires the government to prove all elements of an offense beyond a reasonable doubt. Pet. App. 22a. But it explained that a statute like Article 120 may permissibly require the accused to prove "an affirmative defense even when the evidence pertinent to an affirmative defense also may raise a reasonable doubt about an element of the offense." *Id.* at 22a-23a. As long as the jury is permitted to "consider evidence that may raise a reasonable doubt about [such] an element," the court reasoned, the "burden of proof as to all elements remains on the prosecution" and the defendant's burden of proving an affirmative defense will not improperly "shift the burden" to him of disproving an element of the offense. *Id.* at 26a. Given those principles, the CAAF stated that "[a] properly instructed jury may consider evidence of consent" under Article 120 both in determining "whether the prosecution has met its burden on the element of force" with proof beyond a reasonable doubt and, separately, in evaluating "whether the defense has established [the] affirmative defense" of consent. *Id.* at 26a-27a; see *id.* at 30a (Article 120(r) does not prohibit "considering evidence of consent, if introduced, as a subsidiary fact pertinent to the prosecution's burden to prove the element of force beyond a reasonable doubt.").

The CAAF accordingly held that Article 120 does not itself create an "unconstitutional element-based affirmative defense" of consent. Pet. App. 33a. The court, how-

---

warrant special treatment. Such misconduct by military personnel "can have a devastating impact on the good order and discipline essential to the conduct of military operations" and can undermine "relationships with the local population" that are "critical to our Nation's military and foreign policy objectives." *Ibid.*

ever, left other issues unresolved. It declined to determine whether Article 120 was "unconstitutional as applied to [petitioner]" in this case because a decision on that question would be "premature" in this interlocutory appeal given that, *inter alia*, no "instructions regarding consent evidence" have yet been given to the members of the court-martial panel. *Id.* at 34a-35a. The court likewise declined to address the respective burdens of the prosecution and the defense regarding an affirmative defense under Article 120, and it declined to decide whether the evidence presented was sufficient to raise the affirmative defense of consent. *Id.* at 35a-36a.

Judges Ryan and Erdmann concurred in part and dissented in part. Pet. App. 38a-43a. In their view, Congress unconstitutionally shifted the burden to prove "force" from the government to the defense by making "consent" an affirmative defense under Article 120. *Id.* at 39a-43a.

ARGUMENT

Petitioner contends (Pet. 6-23) that Article 120 violates due process by shifting the burden of disproving the element of "force" to the defense. The interlocutory decision of the CAAF is correct and does not conflict with any decision of this Court or any other court of final appeal. Further review is unwarranted.

1. In civilian contexts, the Due Process Clause requires the government to prove each element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). It follows that a legislature may not direct an ingredient of an offense found in "the definition of th[e] crime" to be "presumed" by the finder of fact "upon proof of the other elements of the offense" and force the defendant to "rebut[]" that presumption.

Patterson v. *New York*, 432 U.S. 197, 215-216 (1977) (interpreting *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975)). Even if those civilian due process requirements applied with equal force to military offenses under the UCMJ, Article 120 would satisfy due process.[7]

Requiring the government to prove each element of an offense beyond a reasonable doubt does not prohibit the legislature from requiring a defendant to establish an affirmative defense by some quantum of proof. *Patterson*, 432 U.S. at 204. A state, for instance, may require a defendant to prove the defense of "extreme emotional disturbance" in order to escape liability for murder, even though such "evidence of the defendant's mental state" is relevant to an element of the crime, *i.e.*,

---

[7] The Due Process Clause plays a much more circumscribed role in the military justice system than it does in civilian contexts. The Constitution vests Congress with primary responsibility for making rules to govern and regulate the Armed Forces, U.S. Const. Art. I, § 8, Cl. 14, and Congress therefore possesses broad authority to define military offenses that would not constitute crimes in the civilian world. See *Parker* v. *Levy*, 417 U.S. 733, 749, 756 (1974). Thus, although the "[Due Process] Clause provides some measure of protection to defendants in military proceedings," this Court has emphasized that "[j]udicial deference" to Congress's Article I authority in this area "'is at its apogee'" and "extends to rules relating to the [constitutional] rights of servicemembers." *Weiss* v. *United States*, 510 U.S. 163, 176-177 (1994) (citation omitted). In order to establish a due process violation, the factors militating in favor of additional court-martial protections beyond those specified by Congress must be "so extraordinarily weighty as to overcome" Congress's judgment striking a balance between "the rights of servicemen [and] the needs of the military." *Id.* at 177-178. Petitioner has not identified any such factors in this case, and the CAAF explained the importance of strong sexual misconduct prohibitions in this military context. See p. 7 n.6, *supra*; cf. *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) (the court of military appeals' "judgments are normally entitled to great deference").

the defendant's intent to cause the death of another. *Id.* at 198, 206. Due process simply requires that the prosecution establish "the facts constituting a crime * * * beyond a reasonable doubt, based on all the evidence," including any evidence pertaining to an affirmative defense. *Id.* at 206; see *Martin* v. *Ohio*, 480 U.S. 228, 233-234 (1987). As long as the trier of fact evaluates the sufficiency of the government's affirmative case based on "all of the evidence," a legislature may define the elements of an offense and a statutory affirmative defense such that they "overlap" in the sense that "evidence to prove the latter will often tend to negate the former." *Id.* at 234. This Court has therefore concluded that such a logical overlap will not impermissibly "shift to the defendant the burden of disproving any element of [the government's] case." *Ibid.*; see *id.* at 230-234 (holding that affirmative defense of self-defense permissibly overlaps with prosecution's burden to prove a "purposeful killing by prior calculation and design" even though "most" such defenses would negate an element of the crime); cf. *Dixon* v. *United States*, 548 U.S. 1, 5-8 (2006) (due process is satisfied where defendant has burden of proving duress in case where the government must show a knowing or willful statutory violation).

By making "consent" an affirmative defense, Article 120(e) does not shift to the accused the burden of disproving "force." Congress made clear that "force" is an element of the offense of aggravated sexual contact by force, but consent is not. See 10 U.S.C. 920(e) and (r); see also 10 U.S.C. 920(a)(1). Congress's 2006 amendment of Article 120 defined that offense to turn on the force employed by the accused, not the victim's mental state or conduct. And although consent is often relevant

in determining whether "force" has been established beyond a reasonable doubt, it is not invariably so.

For instance, a defendant uses "force" if he takes action to "prevent another's resistance" with physical strength "applied to another person" such that "the other person could not avoid or escape the sexual conduct." 10 U.S.C. 920(t)(5)(C). If sexual contact ensues (with the requisite intent, 10 U.S.C. 920(t)(2)), the defendant could be found guilty of aggravated sexual contact. See 10 U.S.C. 920(c). That is true even where the nominal victim enjoyed the defendant's use of "force" and affirmatively consented to the contact. In such circumstances, the defendant would be entitled to show "consent" as an affirmative defense, *i.e.*, a defense that allows the accused to deny "criminal responsibility" *without* denying that he "committed the objective acts *constituting the offense* charged." 10 U.S.C. 920(t)(16) (emphasis added).

We may assume that, in most cases, proof of "consent" will be directly relevant to and may negate the element of "force." But that assumption does not advance petitioner's cause. Even if "*most* encounters in which [consent] is claimed" by a defendant involve evidence that "negate[s]" the government's proof of the element of force, the defendant's option of pursuing that affirmative defense "does not shift to the defendant the burden of disproving any element of the [government's] case." *Martin*, 480 U.S. at 234 (emphasis added). As long as the finder of fact may consider such evidence when evaluating whether the *government* has proven the element of force beyond a reasonable doubt, no due process problems arise.

Petitioner argues that proof of "consent" will "*always* raise a reasonable doubt about the element of

force" under Article 120, Pet. 13 (emphasis added), and distinguishes this Court's decision in *Martin* as limited to contexts in which an affirmative defense "often" will negate an element of the offense. Pet. 12-19. Petitioner's argument suffers from multiple defects.

First, its premise is incorrect. "Force" and "consent" are logically distinct and they focus on different facts, *i.e.*, the defendant's actions and the victim's state of mind manifested in "words or overt acts" indicating voluntary agreement to the conduct. 10 U.S.C. 920(t)(14). "Force" can thus be separately established even when "consent" exists. See p. 12, *supra* (providing example); cf. 2 Wayne R. LaFave, *Substantive Criminal Law* § 17.4, at 637-638 & n.8 (2d ed. 2003) (explaining that where "force and lack of consent" are both elements of an offense that must be separately proven, "it is possible that the force element" may be proven without proving non-consent). Indeed, Congress emphasized the distinction between the "force" required as an element of the offense, 10 U.S.C. 920(a)(1), and (e), and the affirmative defense of "consent," 10 U.S.C. 920(r) and (t)(14), by emphasizing that the affirmative defense does *not* require a defendant to deny "the objective acts constituting the offense charged," 10 U.S.C. 920(t)(16), which include the defendant's use of "force."

Second, petitioner proffers an unduly narrow reading of *Martin*. *Martin* construed the due process right recognized in *Winship* that protects the accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." *Martin*, 480 U.S. at 231-232 (quoting *Winship*, 397 U.S. at 364). That right, the Court recognized, would be violated if the jury's "determin[ation] whether there was a reasonable doubt about the [government's] case" was

constrained by forcing the jury to ignore evidence of an affirmative defense relevant to the state's case "unless [the defense] satisfied the preponderance standard." *Id.* at 233-234. But nothing in *Martin* suggests that the government is improperly excused from its obligation to prove every element beyond a reasonable doubt if the jury can properly evaluate that burden based on "all of the evidence." *Id.* at 234. Indeed, outside the context of impermissible evidentiary presumptions of the type at issue in *Mullaney* (see pp. 9-10, *supra*), the due process requirement of proof beyond a reasonable doubt is one that is largely controlled through jury instructions allocating the burden of proof among the parties. And because no jury instructions have been given in this case, that question is not before the Court.

2. The decisions of courts of final appeal in analogous contexts are consistent with the judgment below. In *State* v. *Camara*, 781 P.2d 483 (Wash. 1989), for instance, the Washington Supreme Court examined a modern rape statute that included "forcible compulsion" as an element of the offense and treated "consent" as an affirmative defense. *Id.* at 485-486. The court held that the offense did not offend due process principles even though there was "conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion" because the defense could "'negate[]' an element of [the] crime." *Id.* at 487. *Camara* emphasized that jury instructions should ensure that the government is not relieved of its burden of proving each element by addressing that overlap and explaining that the State has an "unalterable burden of proving beyond a reasonable doubt every element of the crime charged," including forcible compulsion. *Ibid.*

In *Russell* v. *United States*, 698 A.2d 1007, 1016-1017 (D.C. 1997), the D.C. Court of Appeals, similarly upheld a "modernize[d]" sexual abuse statute that applied to conduct that "causes another person to engage in or submit to a sexual act * * * [b]y using force against that other person." *Id.* at 1009 & n.4 (quoting predecessor to D.C. Code § 22-3002 (2010)). Like Article 120, the statute was "intended to change the focus of the criminal process away from an inquiry into the state of mind or acts of the victim into an inquiry into the conduct of the accused" by eliminating "'lack of consent' as an element of the offense." *Id.* at 1009. The *Russell* court recognized that evidence of consent was "relevant to the government's burden of proof" regarding force, but it concluded that the legislation "did not require the defendant to disprove any element of the offense as defined in the statute" even though evidence of the defense could "'negate'" the government's proof of the element of force. See *id.* at 1016-1017 (citation omitted).[8]

Petitioner himself acknowledges (Pet. 15-18) that the decisions that have considered analogous sexual offense statutes are consistent with the decision below. Petitioner nonetheless contends (Pet. 13-14) that *Humanik* v. *Beyer*, 871 F.2d 432 (3d Cir.), cert. denied, 493 U.S. 812 (1989), supports his cause. That is incorrect. *Humanik* concluded that a murder defendant's due process rights were violated by jury instructions because there was a "reasonable likelihood" that a juror would have concluded that "the defendant's evidence [regarding his

---

[8] *Russell* concluded that the jury instructions before it did not sufficiently advise the jury that it could consider evidence of the consent defense when "considering the force element of the offense," 698 A.2d at 1013-1016, but, because no instructions are at issue here, that portion of the decision is irrelevant to petitioner's present challenge.

mental-defect defense] should be considered on the [element of] intent" to kill "only if the juror finds [the defense] to be more likely true than not true." *Id.* at 441-442. *Humanik* simply holds that "a jury may not be told" that the defendant's "'evidence must be put aside . . . unless it satisfie[s] the preponderance standard" because, the court reasoned, such evidence of an affirmative defense "cannot constitutionally be ignored" if it can "raise a reasonable doubt about the existence of [an element of the offense]." *Id.* at 443. The members of the court-martial in this case have yet to be instructed by the court and, as the CAAF held, nothing in Article 120 prohibits the members from "considering evidence of consent, if introduced, as a subsidiary fact pertinent to the prosecution's burden to prove the element of force beyond a reasonable doubt." Pet. App. 30a.

3. Finally, this case would be a poor candidate for review because of its interlocutory posture. Any review by this Court on the question presented should involve a case in which jury instructions have been given to define how the finder of fact should evaluate proof of the elements of the offense and any affirmative defense. Such evidentiary instructions would be particularly important to this Court's plenary review because the due process right at issue here is ultimately a right against "conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute" the offense. *Martin*, 480 U.S. at 231-232 (quoting *Winship*, 397 U.S. at 364). Indeed, the relevant decisions involving due process challenges in similar contexts have arisen after criminal convictions were obtained based on jury instructions that reviewing courts have examined in light of that due process requirement. See, *e.g.*, *Martin*, 480 U.S. at 230; *Patterson*, 432 U.S. at 199-200; *Humanik*,

871 F.2d at 441-443; *Russell*, 698 A.2d at 1013-1016; *Camara*, 781 P.2d at 487-488. Any review should thus await a case that provides this Court with a complete trial record, including jury instructions, to allow the Court to explore fully the scope of the due process protection that the petition invokes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney

AUGUST 2010